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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 535

JAMES ROLLA THOMAS, FOR HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,

Appellant,

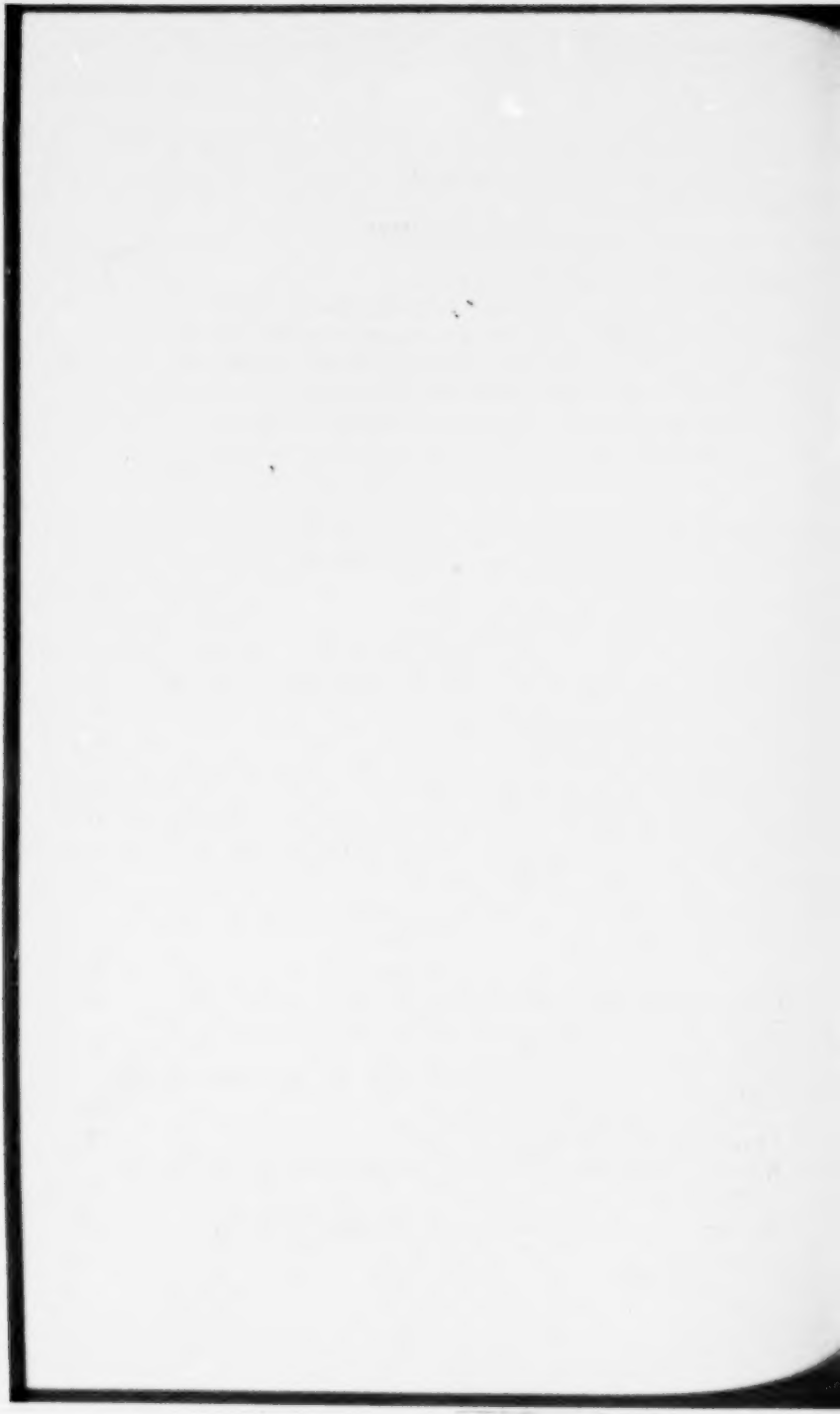
vs.

THE DAUGHTERS OF UTAH PIONEERS, A NON-PROFIT CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

STATEMENT OPPOSING JURISDICTION

CLINTON D. VERNON,
Attorney General of Utah;
MARTIN M. LARSON,
Counsel for Appellees.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 535

JAMES ROLLA THOMAS, FOR HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiff,

vs.

THE DAUGHTERS OF UTAH PIONEERS, A NON-PROFIT CORPORATION; HERBERT B. MAW, GROVER A. GILES AND HEBER BENNION, JR., INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EXAMINERS OF THE STATE OF UTAH; JERROLD P. BEESLEY, J. FRED PINGREE AND HENRY McGEAN, INDIVIDUALLY AND AS MEMBERS OF THE COMMISSION OF FINANCE OF THE STATE OF UTAH AND AS MEMBERS OF THE UTAH STATE LAND BOARD; RAY H. LEAVITT, LAYTON MAXFIELD AND WILLARD A. DAY, INDIVIDUALLY AND AS MEMBERS OF THE UTAH STATE BUILDING BOARD; REESE M. REESE, INDIVIDUALLY AND AS THE TREASURER OF THE STATE OF UTAH, FARRELL H. ADAMS, INDIVIDUALLY AND AS THE AUDITOR OF THE STATE OF UTAH,

Defendants.

STATEMENT IN OPPOSITION AND AGAINST JURISDICTION

The defendants-respondents, dispute plaintiff-appellant's statement and argument in support of the jurisdiction of

The Supreme Court of the United States to review the above entitled cause on appeal, and respectfully represents:

I

The Pleadings, Opinion of the Supreme Court of Utah, and Plaintiff-Appellant's Statement in Support of Jurisdiction Each and All Reveal and Show Cause There Is No Substantial Question Involved under the Constitution of the United States.

The position and argument of plaintiff-appellant seems to be based upon what he terms and sets out as the Lease to the Daughters of Utah Pioneers. That instrument as appears from the pleadings, the Opinion and Decision of the Supreme Court of Utah, and the Statement in Support of Jurisdiction was made and entered into under an Act of the State Legislature in 1941, authorizing and directing the lease of the land to the Daughters of Utah Pioneers on which the Daughters were to erect a Pioneer Memorial Building. In 1945 the Legislature changed the plans as to the Memorial Building and passed an Act, with the consent and acquiescence of the Daughters of Utah Pioneers, where the State assumed and took over the land and the project, and itself undertook the planning and erection of the building and appropriated money therefor. The Daughters of Utah Pioneers, Lessee under the 1941 Lease, not only yielded up their rights under the lease, but gave to the State the sum of $75,000.00 towards the construction of the building. Upon the arguments before the Supreme Court of Utah, and in defendants' Brief in that court, it was pointed out, and shown, that the 1941 Lease, pleaded, and relied on even now, had been waived, supplanted, and voided by the Legislature with the consent and acquiescence of the Daughters, Lessee in the Lease. The Supreme Court of Utah in its Opinion and Decision so held, and declared

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that lease, as pleaded and urged and relied upon by the plaintiff had been terminated by the parties, as and because it was wholly inconsistent with the new relationships and plans with respect to the building set up in 1945.

It follows therefore that the Lease, and also all matters argued by plaintiff-appellant that have any reliance on, or pertain to the lease have been settled and determined by the Supreme Court of Utah. Since plaintiff-appellant does not complain of such holding by the Utah Court; since he does not contend the Lease should have been upheld as valid and binding, no question as to the lease, or as to statutes involved in this action, can involve, raise, or present any question under the federal constitution, because of any provision in the lease or rights under it, or contentions as to what might, could or would have resulted therefrom.

As to all such questions or matters or issues there is no basis for interposition or review by the Supreme Court of the United States; no question calling for or involving its jurisdiction.

II

The next question is: Do the statutes of the State of Utah, being Sections 48.10, 48-11, 48-12, and 48.13 of Chapter 1 of Title 86, Utah Code Annotated, 1943, as amended by Chapter 128 of the Laws of Utah, 1945, and the provisions of Chapter 122, of the Laws of Utah, 1947, which statutes direct the State Building Board, a state board created by law to have charge of all State Building Construction, to erect a Pioneer Memorial Building, and appropriating money, offend against the Constitution of the United States? As shown by topic I above, the lease to which plaintiff-appellant directs most of his argument is eliminated from consideration by the statutes assailed, by the admissions and argument of defendants-respondents in their brief before the Supreme Court of Utah and by the opinion and decision of that Court.

It follows therefore that if the constitution of the United States does not prohibit the State of Utah from appropriating money for the erection of a State building, to-wit: a Pioneer Memorial Building on State lands for the purpose of preserving and exhibiting relics, histories, records, and other things commemorating, and showing the life, history, and events of the Pioneers of Utah and the early history of the State, then there is no federal question presented in this case to invoke the jurisdiction of the Supreme Court of the United States to entertain an appeal in this action or review the decision and judgment of the Supreme Court of the State of Utah.

All questions involving the constitutionality of the statutes, so far as the Utah Constitution is concerned, were settled by the Supreme Court of the State, the Court of last resort, so far as the State constitution is concerned. We understand that plaintiff-appellant does not dispute or question the fact that the State has the right and power to erect a Pioneer Memorial Building for the purposes indicated and to appropriate money therefor. *Allied Architects* v. *Payne*, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; *Slavich* v. *Hamilton*, 201 Cal. 299, 257 P. 60; *U. S.* v. *Gettysburg*, 160 U. S. 668, 16 S. Ct. 427, 40 L. Ed. 576.

III

The statutes involved in this case do not confer any right or privilege upon the defendants-respondents, Daughters of the Utah Pioneers, unless it is found in that expression in the first section of the statute, to-wit: Sec. 48.10, Utah Code Annotated, 1943, as amended in 1945, above referred to, which provides that the State Land Board shall execute a lease of the grounds and building to the Daughters of Utah Pioneers. That is not the lease pleaded by the plaintiff-appellant as is evident from the decision of the Supreme Court of the State of Utah. Is a State statute void under

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the Federal Constitution because it authorizes a lease of State property for use, for the purposes for which said property was acquired and the buildings thereon erected, which use is a public use for the benefit of the state and its people and out of which the lessee could derive no pecuniary benefit and would serve only as custodian and caretaker for the State? That such question must be answered in the negative, see *Hagar* v. *Kentucky Children's Home Society*, 119 Ky. 235, 83 S. W. 605. *Conley* v. *Daughters of the Republic of Texas*, 151 S. W. 877; same case 156 S. W. 197; *Leatherwood* v. *Hill*, 10 Ariz. 243, 89 P. 521.

IV

A Lease By the State of State Land and Buildings to Be Used By the Lessee, for the Express Public Purposes for Which the State Erected the Buildings Is Not a Franchise, Privilege or Immunity Within the Meaning of the Federal Constitution.

An interesting case is *City of Hartford* v. *Maslen*, 76 Conn. 599, 57 Atl. 740. This was a case where the legislature authorized erection by a private party of a memorial at state expense on grounds which had been acquired for state capitol purposes.

In the case of *Weiler* v. *Monroe County*, 76 Miss. 492, 25 So. 352, the court upheld a lease given by the public for 99 years as not assailable on the grounds of its length.

In the case of *Gere* v. *N. Y. Central Railroad Co.*, 19 Abbott's N. C. (N. Y.) 193, the court held that a lease is not void because it extends beyond corporate life of the lessee.

In the *Shepherds Fold of the Protestant Church* v. *Mayer, et al.*, 96 N. Y. 137, the court upheld a legislative act appropriating money to the plaintiff (a strictly church organization for rendering public service in the care and place-

ment of dependent children for which purpose it was organized.

Nichols v. *School Directors*, 93 Ill. 61, upheld a lease of school buildings to a church for holding Sunday school when not in use for school purposes.

In *Sheldon* v. *Center School*, 25 Conn. 224, the court holds that if a lease is made for a purpose that is lawful, the courts cannot interfere just because under the lease it might be possible to use for illegal or improper purposes. That question cannot be raised until such use actually takes place.

In *Harter* v. *City of San Jose*, 141 Cal. 659, 75 P. 344, the court holds that the legislature has the power to lease or to authorize a city to lease part of a public park for hotel purposes and upheld a 25-year lease.

Higginson v. *Slatery*, 212 Mass. 583, 99 N. E. 523, 42 LRA (N. S.) 215, holds that the legislature is supreme in directing the uses to be made of public lands, state or municipal, and not subject to court review unless the lease is forbidden by the constitution. *Greeley* v. *People*, 60 Ill. 19, declares that such problems must by the courts be left wholly to legislative determination.

In *Cushee* v. *City of N. Y.*, 58 N. Y. Supl. 967, the court declared that a lease of state or city lands is not assailable because its duration is longer than the time fixed by statute until the statutory time has run. See also *Brooklyn Park* v. *Armstrong*, 45 N. Y. 234.

The Maryland case of *Glottiab* v. *Kacklin*, 109 Md. 429, 71 Atl. 949, 31 LRA (N. S.) 580, holds that the legislative power to lease state lands is unlimited. The case is annotated in 31 LRA.

Reference is also made to *Wright* v. *Walcott*, 238 Mass. 432, 131 N. E. 291, 18 ALR 1242 and note c 2, 6; e 2, d and

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f in annotation. *Commonwealth* v. *Connellsville Borough*, 201 Pa. 154.

The provision against granting franchises, privileges and immunities, has as its purpose and basis, principles which led to the first ten amendments to the Constitution of the United States, the Bill of Rights. They are restrictions on the power of the State to infringe upon the basic, elementary, unalienable rights of the individual to destroy the inherent personal liberties of the individual, and to alienate to any other person or body any of its sovereign power.

Franchise as used in the Constitution has reference to the powers of sovereignty. It is an inhibition against the State surrendering the powers inherent in sovereignty, and which no individual can exercise of his own right. It was defined by the Supreme Court of the United States in *Calif.* v. *Central Pac. R. R. Co.*, 127 U. S. 1, 8 Sup. Ct., 1073, 32 L. Ed. 150:

> "A franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals, at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."

Thompson on Corporations, Vol. 4 para. 5335 says:

> "To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature, which cannot be legally exercised without legislative grant."

In *People ex rel. N. Y. Central* v. *Gilchrist*, 222 N. Y. Suppl. 169, 171, the court says: "A right enjoyed incident to the ownership of land is in no sense a franchise. It is a

privilege conferred by property ownership." It conclusively appears that a lease of land is not a franchise; nor is it a privilege or immunity.

The Minnesota court in *Dike* v. *State*, 38 Minn. 366, 38 N. W. 95, construing a constitutional provision says that privilege means "a right or immunity granted to a person either against or beyond the courts of the common or general law." It is a special release from the restraints of a negative command of the law. An immunity is the right to be exempt or immune from a positive duty or obligation imposed on the citizens generally by the law. To the recipient a privilege confers a positive right, an immunity relieves from a duty or obligation. An almost identical case is *Leatherwood* v. *Hill*, 10 Ariz. 243, 89 P. 521, where the legislature made an appropriation to the Arizona Pioneers, a private corporation organized for purposes similar to the Daughters of the Utah Pioneers. Another case almost identical is *Conley* v. *Daughters of the Republic of Texas*, 106 Tex. 80, 151 S. W. 877, where the State acquired property formerly a part of the Alamo Mission and the legislature required the Governor to deliver the property to the custody and care of the Daughters of the Republic of Texas, organized for purposes similar to the Daughters of the Utah Pioneers. In both cases, the courts upheld the legislative enactments, the appropriations and the leases as in no way offensive to constitutional provisions.

We are sorry to be under the necessity of indicating inaccuracies in plaintiff-appellant's statement. The constitution of the Daughters of the Utah Pioneers does not require members of a camp to be residents of an ecclesiastical ward of the Church of Jesus Christ of Latter Day Saints as stated by appellant in his statement of jurisdiction. Again the constitution of the Daughters of the Utah Pioneers definitely makes plain that the central company is composed

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of the governing body of the organization who are elected at a convention held every two years. Again appellant states that the lease to the Daughters of the Utah Pioneers which the legislature authorized was for an annual rental of one dollar which he argues is tantamount to a fee grant. He avoids the fact that the Daughters of the Utah Pioneers were required by the legislature to deposit with the State $75,000.00 to be used in construction of the building. The record shows that they actually deposited with the State more than $87,000.00.

In his Statement in Support of Jurisdiction plaintiff-appellant contends that the provision in the Utah Constitution, Article I, Section 4) that "The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" is identical in meaning with the provision of Article I of the Amendments to the Federal Constitution. He further contends that the decision by the State Supreme Court that the State statutes were not repugnant to the above provision of the State constitution "necessarily involved a decision that they were not repugnant to the similar provisions of the Constitution of the United States."

Plaintiff-appellant does not, and we believe he could not, show wherein that question, as a Federal question, was presented to the State Supreme Court, either by the pleadings or by the arguments, written or oral. Furthermore, we submit that that question neither was considered nor passed upon by the State Supreme Court. The rule that the Supreme Court of Utah will take jurisdiction of questions necessarily involved does not apply to this type of case where the State court was considering the question whether State statutes violated provisions of the State constitution. The State Supreme Court considered that question alone, and did not consider or pass on the question whether those

statutes violated provisions of the Federal Constitution. We submit that that question was not presented to the court, it was not necessarily involved in the proceeding before the State Supreme Court, and it was not decided.

If counsel's argument with respect to religious elements being interjected is well taken, then all United States histories would be objectionable to the Constitution because they all tell the story of how the pilgrims, puritans, catholics, the quakers and others came to this country to live according to their religious tenets. Certainly the Catholic Church has been and is a great proselyting church and the protestant churches maintain local and foreign missions.

We submit that there is no substantial Federal question presented in the entire record to invoke the reviewing jurisdiction of the Supreme Court of the United States and that the record should be remanded to the Supreme Court of the State of Utah for execution of the judgment there entered.

Respectfully submitted,

CLINTON D. VERNON,
Attorney General of the State of Utah;
MARTIN M. LARSON,
Attorney for the Daughters of the Utah Pioneers.

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